breach of contract in the state courts can be asserted. Heretofore, it was demonstrated that the record in this matter—the pleadings, judgment, findings of fact and conclusions of law, the opinion of the trial court as well as the first opinion of the California District Court of Appeal filed February 16, 1956—unequivocally established that the damages for loss of wages were for asserted acts violating Sections 8(b)(1)(A) and 8(b)(2) of the Labor-Management Relations Act, 1947. Consequently, Petitioners submit that it is a gratuitous assumption unsupported by the record to conclude that the damages awarded in this case were . . . *"damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived"*.

(e) Petitioners further contend that there is no merit in the Court's suggestion that the moving party in the trial court must allege an unfair labor practice by name in order to permit the Respondent in the case to raise the federal question. If this were true, the moving party could choose his forum by failing to characterize specifically the acts charged as federal unfair labor practices.

(f) The partial sentence from *Real* v. *Curran*, 138 NYS 2d, 809, 811, mentioned in the opinion filed June 12, 1956 (Appendix D, page 36a), when read in its entirety, is diametrically opposed to the conclusion reached by the California Court, and in fact clearly indicates that federal legislation has pre-empted state jurisdiction with respect to an award of compensation for loss of wages arising from asserted acts constituting unfair labor practices.

No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; CHARLES TRUAX, individually and as International Representative thereof; THOMAS E. MCSHANE, and A. C. MCGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE and FIFTH DOE, *Petitioners,*

v.

MARCOS GONZALES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA DISTRICT COURT OF APPEAL

PLATO E. PAPPS, *Chief Counsel*
International Association
of Machinists
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Washington 6, D. C.

EUGENE K. KENNEDY
733 Middlefield Road
Redwood City, California

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

PLATO E. PAPPS, *Chief Counsel*
International Association
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TABLE OF CONTENTS

INDEX OF CITATIONS

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v.

MARCOS GONZALES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA DISTRICT COURT OF APPEAL

Petitioners pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal, State of California, First Appellate District, Division One, entered on June 12, 1956.

CITATIONS AND OPINIONS BELOW

The memorandum opinion of the Superior Court of California, in and for the City and County of San Francisco, a court of general jurisdiction, dated June 7, 1954, is unreported and is printed in Appendix "A" *infra* page 1a.

The judgment of the Superior Court dated July 29, 1954, is printed in Appendix "B" *infra* page 7a.

The opinion of the District Court of Appeal, State of California, dated February 16, 1956, printed in Appendix "C" *infra* page 9a is unreported but may be found in 139 ACA 2d 262.

The opinion of the District Court of Appeal, State of California, dated June 12, 1956, printed in Appendix "D" *infra* page 9a is reported at 142 ACA 2d 227.

JURISDICTION

The judgment of the District Court of Appeal, State of California, was entered on June 12, 1956. Appendix "B", page 7a, *infra*. A timely Petition for Hearing was filed in the California Supreme Court and denied on August 8, 1956. The Federal questions below were timely raised and preserved. The opinions of the California District Court of Appeal reflect a consideration of these questions. Appendices C and D *infra*.

The statutory provisions involved are included in the Labor-Management Relations Act, 1947 (61 Stat. 136; 29 U.S.C. (Supp. I), Sec. 141 *et seq.*), and the jurisdiction of this Court is invoked under 28 USC 1257 (3) on the grounds that Petitioners have been denied their rights, privileges and immunities as

provided in the Labor-Management Relations Act, 1947.

QUESTIONS PRESENTED

The primary question presented is whether a state tribunal has jurisdiction to award compensation for loss of earnings against a union in favor of an employee for asserted acts by the union which constitute unfair labor practices under Sections 8(b)(1) and 8(b)(2) of the Labor-Management Relations Act, hereinafter sometimes designated as the Act.

There is also a subsidiary question challenging the jurisdiction of a state court to award any damages resulting from an unfair labor practice under Sections 8(b)(1) and 8(b)(2) of the Act.

STATEMENT OF THE CASE

Marcos Gonzales, herein called Respondent, refused to comply with a penalty imposed by the Executive Council of the International Association of Machinists. On his refusal to so comply, he was separated from the Union. Respondent then brought an action in the state court for reinstatement in the union, as well as an action for damages for loss of wages. Subsequently, Respondent amended his complaint to claim damages for mental suffering. The award for mental suffering was based at least in part if not entirely on the union's refusal to refer Respondent for work under the provisions of a union referral procedure, and Petitioners were also ordered to reinstate Respondent in the union. Petitioners are not here raising any question as to the correctness of the order of reinstatement, but are addressing this Petition to the question of the state court's jurisdiction to award

compensation for loss of earnings and damages arising from an unfair labor practice. The judgment awarded $6,800.00 for loss of wages, and $2,500.00 for grievous physical and mental pain and suffering, humiliation, anxiety and degradation. (Appendix B, *infra*).

In their original answer Petitioners alleged that Respondent had an adequate remedy at law under Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act, as amended. (Appendix F, *infra*). On leave granted by the California District Court of Appeal, a supplemental brief was filed by Petitioners, dated July 12, 1955, contending that the National Labor Relations Board was the sole forum to make a determination of entitlement to compensation and damages in a type of case presented by this record.

In its decision filed February 16, 1956, the California District Court of Appeal, while upholding Respondent's order of reinstatement in the union, reversed the award of damages in the trial court on the ground that that determination was solely for the National Labor Relations Board.

Thereafter, following a petition for rehearing by Respondent, the California District Court of Appeal on June 12, 1956, reversed its decision of February 16, 1956, and decided that Respondent should be awarded damages.

The record shows that the award of $6,800.00 for loss of wages was based on Petitioners' asserted denial to Respondent of the use of the union hiring procedures. Respondent's petition for a writ of mandate alleges that his loss of employment was "solely by reason of"

his illegal expulsion by the Union. (Clks. Tr. 9, App. E *infra*).

It is undisputed that the Employers with whom the Union had a union referral arrangement are in interstate commerce within the meaning of Section 2(7) of the Act. In fact the Union is the certified bargaining representative for the employees of these Employers.[1]

It should be here noted that prior to the filing of the complaint in this cause Respondent Gonzales filed with the National Labor Relations Board unfair labor practice charges alleging that the Petitioners had committed unfair labor practices. These charges were voluntarily withdrawn by the Respondent and he then commenced this proceeding. (R. Tr. 47; 48; 51). It should be here noted that under the unfair labor practice provisions involving Section 8(b) of the Act, an employer is not a necessary party to an unfair labor practice proceeding.

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[1] The record demonstrates and it is implicit in the two decisions of the District Court of Appeal and the briefs and petitions of Respondent's counsel that this is a matter for federal jurisdiction under the power to regulate interstate commerce. Testimony of Respondent indicates that following his separation from the union, he was refused work at Columbia Machine Company, Triple A Machine Shop and Wagner-Niehaus and that he also failed to obtain work at Matson Navigation Company (Rep. Tr. 36).

Petitioner's Exhibit 9 (trial court designation) on page 29 (Appendix I herein), reflects that in N.L.R.B. Case No. 20-RC-1275, Columbia Machine Works, Triple A Machine Shop and Wagner-Niehaus were included in the bargaining unit certified by the National Labor Relations Board. Also included in this unit was Pacific Ship Repair, Inc., where Respondent testified he last worked in February 1952 (Rep. Tr. 33). There is also included in the record that Respondent's work was primarily on ocean-going vessels and that at some times he was employed by the General Electric Company (Rep. Tr. 6, 33).

Referring to Respondent's suspension from membership, the opinion of the trial court states that:

> "Petitioner [Respondent] was by virtue of said action, prevented from working as a machinist and thereby sustained loss of wages. The petitioner was out of work from March 4, 1952, to June 26, 1953, when he became incapacitated because of illness. We have assessed the damages for said period to be in the sum of $6,800.00 at the rate of $100.00 per week, which as testified by petitioner, was the lowest weekly wage received by him during the years 1950, 1951 and 1952". Clks. Tr. 41, Appendix "A", page 1a *infra*).

It also appears from the Findings of Fact and Conclusions of Law (Clks. Tr. 49, Appendix G, page 40a *infra;* Clks. Tr. 52, Appendix H, page 40a *infra*) that the award of damages was because Petitioners caused Respondent to lose employment by reason of his separation from the union.

Further, the judgment of the trial court (Appendix B, page 7a *infra*) recites that $6,800.00 was awarded for loss of wages. Since the wage loss was determined to have been caused by Petitioners, such wage loss was caused by asserted acts in violation of Sections 7, 8(b)(1)(A) and 8(b)(2) of the Act (Appendix J).

The decision of the California District Court of Appeal of February 16, 1956, stated:

> *"Because the withholding from petitioner [Respondent] of the required card to obtain employment and the refusal of the union dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently, the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages by the trial court was beyond*

the jurisdiction of the trial court and must be reversed." (Emphasis ours) (Appendix C, page 21a *infra*).

In its decision of June 12, 1956, reversing its judgment on damages, the California District Court of Appeal in the opinion of Petitioners based its decision on assumptions without merit, some of which Petitioners will indicate under the Reasons for Granting Certiorari.

Petitioners have failed to obtain a judicial expression at any stage of this case concerning the significance of Respondent's Exhibit "E" (trial court designation) which indicates that as far as Petitioners were concerned, Respondent was out of work, except for one month, in the years 1950, 1951 and 1952. This Exhibit is a concededly authentic union record, and since the trial court awarded damages of $100.00 per week starting in March of 1952, on the strength of Respondent's testimony that his lowest weekly wage received by him during the years 1950, 1951 and 1952 was $100.00 per week, it was Petitioners' contention that the award of damages was not supported by the record in this matter. (Rep. Tr. 33). (Rep. Tr. 116, 117)

REASONS FOR GRANTING THE PETITION

(1) This Court has decided that an unfair labor practice within the meaning of the Act is solely for the determination of the National Labor Relations Board in the first instance if there is a remedy and if non-violent conduct is involved. *Garner* v. *Teamsters Union,* 346 U.S. 485; *Weber* v. *Anheuser-Busch,* 348 U.S. 468; *United Construction Workers* v. *Laburnum,* 347 U.S. 656.

Inasmuch as the record facts before the court indicate that damages were awarded for asserted acts constituting a violation of 8(b)(2) and 8(b)(1)(A) of the Act, it follows that the judgment of the California Court is in conflict with the foregoing decisions of this Court. This follows because the complete remedies of the Act were available to Respondent and the asserted acts involve non-violent conduct. *Radio Officers* v. *N.L.R.B.*, 347 U.S. 17.

(2) With respect to the narrower question of loss of wages flowing from a violation of 8(b)(2) and 8(b)(1) of the Act, the case at bar is squarely in conflict with the following decisions:

Born v. *Laube*, 213 F. 2d 407, 214 F. 2d 349, cert. den. October 18, 1954, 348 U.S. 855.

Sterling v. *Local 438*, 207 Md. 132, 111A 2d, 389, cert. den. October 24, 1955, 350 U.S. 875.

Mahoney v. *Sailors Union of the Pacific*, 45 Wn. 2d 453, 275 P. 2d 440, cert. den. April 25, 1955, 349 U.S. 915.

Real v. *Curran*, 138 N.Y.S. 2d, 809.

The above cases hold that jurisdiction to award damages for wage loss in the type of case at bar is solely for federal determination. *Contra: Taylor* v. *Marine Cooks & Stewards*, 177 Cal. App. 2d 556.[2]

(3) Concerning the award for mental anxiety connected with wage loss (Rep. Tr. 132, 134, 142, 143), the case at bar conflicts in principle with *Born* v. *Laube* and *Sterling* v. *Local supra*, wherein the aggrieved union members were awarded damages for

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[2] This case was decided prior to this Court's Opinion in *Garner* v. *Teamsters Union*, 146 U.S. 485, without mention of cases, statutes or constitutional provisions, and merely stated that the Taft-Hartley Law did not divest the California Court of jurisdiction in the *Taylor* case.

loss of wages and also exemplary damages for upon actions constituting unfair labor practices. Both appellate decisions held that merely because the state remedy went beyond the federal remedy afforded by the Act, the remedy sought was a question for consideration by the National Labor Relations Board in the first instance, and the judgment awarding damages for loss of wages as well as exemplary damages was reversed. Petitioners submit that in the context of the questions here presented, an award for mental anxiety in connection with an award for wage loss arising from the unfair labor practices is no different in principle from an award of exemplary damages in connection with wage loss. On this question, the Ninth Circuit Court of Appeals in the *Born* opinion (213 F. 2d 407) *supra* at page 410 quoted a statement of this Court made by the late Justice Holmes in *Charleston & Western Carolina Railway Co.* v. *Varnville Furniture Company*, 237 U.S. 597, 604:

> "When Congress" he said "has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go".

As an original matter it appears that if a party aggrieved by an unfair labor practice can obtain damages in state tribunals for mental anxiety caused by such unfair labor practice, Congress would have so provided in the Act. This it did not do.[3] *Born* v.

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[3] Section 10(a) provides in part: The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . .

Laube, 213 F. 2d 407, 214 F. 2d 349, cert. den. October 18, 1954, 348 U.S. 855; *Sterling* v. *Local 438,* 207 Md. 132, 111A 2d 389, cert. den. October 24, 1955, 350 U.S. 875.

(4) The questions raised by this case potentially affect the rights of all union members, employees, labor unions, and employers. If it is accepted that an employee can sue a union in a state court for loss of wages caused by a federal unfair labor practice, it follows that he could also sue an employer in a state court for wage loss caused by an employer's federal unfair labor practice. It was this precise problem that Congress dealt with when it enacted the National Labor Relations Act and its successor, and the exclusive remedial powers which it entrusted to the National Labor Relations Board. (*Garner* v. *Teamsters Union,* 346 U.S. 485; *Weber* v. *Anheuser-Busch,* 348 U.S. 468; *United Construction Workers* v. *Laburnum,* 347 U.S. 656).

(5) The following comments are intended to correct what Petitioners believe to be conclusions without merit in the decision of the California District Court of Appeal, dated June 12, 1956, Appendix "D", commencing on page .

(a) Petitioners submit that the complaint in the trial court did not allege a breach of contract as set forth in the opinion, but, to the contrary, alleged that Respondent "has been unable to secure employment in his former occupation solely by reason of the illegal, wrongful and improper expulsion . . ." (Clks. Tr. 9).

Petitioners' answer in the trial court by way of defense alleged that Respondent had an adequate

remedy under the provisions of Section 8(b)(1) and 8(b)(2) of the Act. (Clks. Tr. 26). (Appendix F *infra,* page 39a). Petitioners do not claim this alone raised the federal question but rather cite this to disprove the statement of the California court that the answer said nothing about unfair labor practices.

(b) The court's opinion states that because of Respondent's loss of membership, he was damaged, but Petitioners in view of the foregoing submit that there is no support for the Court's statements that the "damage was not charged nor treated as a result of an unfair labor practice" and that "the question of an unfair labor practice was not raised." In fact, the California District Court of Appeal found these Acts to be unfair labor practices in its decision filed February 16, 1956 (Appendix C, *infra*).

(c) With reference to the statement in the opinion that the original complaint did not characterize asserted acts of Petitioners as unfair labor practices it is true. But it is submitted that this finding is of no significance because Petitioners certainly had no control as to the content of the Respondent's original pleading. Moreover, since Petitioners' position was that they had not caused Respondent's unemployment, it follows that they would not charge themselves with unfair labor practices. Petitioners could only be expected to say, as they did, that the existence of an unfair labor practice, if any, should be determined by the National Labor Relations Board in the first instance.

(d) The decision of June 12, 1956, appears to state that if acts are both federal unfair labor practices and a breach of contract, the state remedy for a